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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1977

No.

77-157

**CHAUFFEURS, TEAMSTERS & HELPERS LOCAL UNION
No. 186,**

Petitioner,

vs.

McNALL BUILDING MATERIALS, INC.,

Respondent.

**Petition for Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit.**

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*To the Honorable Chief Justice of the United States
and the Associate Justices of the Supreme Court
of the United States:*

Petitioner, CHAUFFEURS, TEAMSTERS & HELPERS LOCAL UNION NO. 186, prays that a Writ of Certiorari, issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

Opinion Below.

The opinion of the Court below (Appendix A, *infra*, pp. 1-6) is not reported officially or unofficially.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The judgment of the Court below was entered on March 11, 1977. Petitioner filed a

timely motion for rehearing to the Court below, which was denied April 29, 1977. Jurisdiction of the District Court was based primarily on 29 U.S.C. § 185(a) and 9 U.S.C. §§ 1-9.

Questions Presented.

1. May a federal court refuse to review an arbitration ruling arguably beyond the scope of the arbitrator's authority without violating the due process rights of the grieving party?
2. Is the federal courts' reluctance to review arbitration decisions compatible with 9 U.S.C. § 10?
3. Must the federal courts shield an arbitration award from review when the findings of the arbitrator are in conflict with the express findings of a federal agency?

Statutory Provisions Involved.

The statutory provisions involved in this case are set out in Appendix B, p. 7, *infra*.

Statement.

Petitioner is a labor organization representing employees as defined in the Labor Management Relations Act, 29 U.S.C. § 141, *et seq.*, in this capacity.

On January 24, 1972, petitioner entered into a collective bargaining agreement with respondent. The parties additionally entered into a Memorandum of Agreement, constituting a part of the collective bargaining agreement. Paragraph one of the Memorandum of Agreement provided for an increase in wages of ninety-five cents per hour, commencing November 14, 1971.

At the time of the agreement, all new wage increases of 5.5% or greater were subject to approval of the Cost of Living Council (hereinafter referred to as "Council"), established by the Economic Stabilization Act of 1970, 12 U.S.C. § 1904. Any increase exceeding 5.5% could not be paid to the employees unless approved by the Council. Paragraph 3 of the Agreement provided for reference to the guidelines of Council, as follows:

"In the event any part of such increase is declared by the Pay Board or other Federal Agency or any Court to be not allowable, the employees shall thereafter pay the amounts which are determined to be allowable and the remainder of the amount of such negotiated increases shall be deferred, and the amount deferred or any part thereof shall go into effect without any retroactivity commencing on the day when wage controls are lifted or modified so as to permit such payments to commence."

Upon review, the Council approved an increase in wages exceeding the 5.5% federal guidelines based upon industry wage scales. When the employer refused to pay the retroactive wages, and to arbitrate the matter, as required by the collective bargaining agreement, petitioner filed an action in the United States District Court for the Central District of California, to compel arbitration.

The District Court held that the Council's order clearly compelled the employer to pay the retroactive pay increases. However, since the applicability of paragraph three of the Memorandum of Agreement was in dispute, an order directing arbitration was issued.

The arbitrator's award held that the wage increases were to be retroactive for only one year, rather than the two year period ordered by the Council. In so ruling, the arbitrator balanced the equities, a task already performed by the Council and found to be within the Council's powers by the District Court.

Petitioner subsequently filed a complaint with the District Court asking for an order vacating the arbitration decision on the grounds that the arbitrator had exceeded his authority by adding to or modifying the agreement. The District Court agreed with Petitioner's contentions and vacated the arbitration award.

The United States Court of Appeals for the Ninth Circuit reversed the decision of the District Court and reinstated the arbitration award.

The Court below found (Appendix A, pp. 1-6) that the case "is a close, difficult case and is not one capable of simple resolution." The Court went on to hold that they could not hold that the arbitrator's ruling was not "plausible", and, therefore, must be upheld.

It is from this decision that petitioner appeals to this Court.

REASONS FOR GRANTING THE WRIT.

Several reasons exist in the instant case for this Court to grant this writ. The decision in the Court below is contrary to precedent established by this Court and in conflict with decisions by other Circuits. Additionally, invocation of the Court's supervisory powers may be necessary for the preservation of due process in this area.

In this case, the question submitted to the arbitrator was whether or not paragraph three of the Memorandum of Agreement was applicable to the decision of the Council, requiring full retroactivity of the wage increase.

The arbitrator held that the Memorandum did not allow for, nor proscribe the retroactivity as required by the Council's order. Lacking express language in the contract as to this matter, the arbitrator chose to, in effect, create his own contract language. In so doing, he substituted his own views while totally ignoring the weighing of the equities performed by the Council. The arbitrator found that full retroactivity would create a hardship for the company, despite the Council's findings that fairness required this retroactivity.

The role of an arbitrator when interpreting a collective bargaining agreement, was defined by this Court in *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960). The Court stated:

"... an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for

guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." 363 U.S. at 597.

The arbitrator is not limited to the words of the collective bargaining agreement, but can look to the "practices of the industry and the shop." See, *United Steelworkers v. Warrior Navigation Co.*, 363 U.S. 574 (1960). There is no language contained in the arbitrator's opinion, however, to indicate that this was the source of his decision. Indeed, the arbitrator chose to ignore the Council's findings that practices in the industry were such as to warrant an exception to the federal maximum increase generally allowed.

In fact, there can be no other conclusion but that the arbitrator did not rely on the collective bargaining agreement or industry practices, for his ruling. Therefore, the arbitration award fails the test as stated in *Enterprise, supra*, in that its essence was not derived from the collective bargaining agreement.

In reversing the decision of the District Court, the Court below cited its earlier decision in *Holly Sugar Corp. v. Distillery, Rectifying, Wine and A.W.I.U.*, 412 F.2d 899, 903 (9th Cir. 1969), wherein it held that "If on its face, the award represents a plausible interpretation of the contract in the context of the parties' conduct, judicial inquiry ceases and the award must be affirmed." (at pp. 4-5 of the Memorandum decision below, Appendix A).

The Ninth Circuit has, therefore chosen to allow the arbitrator a freedom to act without any judicial scrutiny while running counter to the restraints imposed by Congress in its enactment of 9 U.S.C. § 10 (Appendix B, *infra*, p. 7).

A second result of this position is to cause a conflict between the position of the Ninth Circuit and that of this Court in *Enterprise, supra*. It is rare that an arbitrator's ruling will be so gross as to not be a plausible interpretation of the collective bargaining agreement.

The Ninth Circuit would have the courts shun all legitimate inquiry as to the validity of the arbitrator's decision. The result would be to prohibit a court from refusing to enforce a decision not derived from the collective bargaining agreement, in all but a few situations, contrary to the express language of this Court's holding in *Enterprise, supra*.

The Council was established by Congress, with authority to determine whether pay increases, such as the one in this case, were compatible with national economic policy. Section 210 of the Economic Stabilization Act, 12 U.S.C. § 1904 provided that the federal district court was empowered to review the validity of a decision of the Council.

In this action, the District Court held that the retroactive pay increase was valid, even though it exceeded the federal guidelines. The arbitrator lacked authority to review the fairness of this decision and his subsequent reduction of the retroactive period was contrary to the express will and intent of Congress in enacting the legislation and beyond the limited scope of the District Court's order compelling arbitration.

It is evident that the Ninth Circuit's hands-off policy has the effect of allowing an arbitrator to rule contrary to express statutory provisions, free from the restraint of judicial review in all but a few extreme cases.

A holding that a collective bargaining agreement allows an arbitrator to ignore the limitations upon his authority as well as the applicable federal statutes, is clearly untenable. Each party has a right to expect that all limitations upon an arbitrator's authority will be enforced and the Ninth Circuit's refusal to protect injured parties from such abuse of authority must constitute a violation of the right to due process of law as contained in the Fifth Amendment.

To avoid this possible result, we submit that the decision of the Ninth Circuit cannot be allowed to stand and that this Court must exercise its power of supervision over the Court below.

Furthermore, this Petition for a Writ of Certiorari should be granted in order to end the split between circuits now existing as to the reviewability of arbitration decisions.

In *Amanda Bent Bolt Co. v. U.A.W. Local 1549*, 451 F.2d 1277 (6th Cir. 1971), 28 employees were discharged for violating a no-strike clause. The arbitrator held that the employees were subject to discharge under the terms of the collective bargaining agreement.

However, the arbitrator ordered reinstatement with full seniority on the grounds that the discharge letters contained an offer to consider the rehiring of those who applied for reinstatement and that this act amounted to a punitive measure at variance with "established disciplinary concepts." (451 F.2d at 1280). He went on to hold that discharge was an overly harsh act.

The Sixth Circuit reversed the District Court's confirmation of the arbitration award, finding that nowhere in the collective bargaining agreement was there a prohibition upon the acts of the employer:

"We hold that award of the arbitrator is contrary to the terms of the collective bargaining contract and was beyond the scope of his authority. Section 5.5 of the contract expressly provides that 'the arbitrator shall have no power to add to, subtract from or modify any of the terms of this agreement.'"

In the present case, Article XI, Section 1(c) of the collective bargaining agreement prohibits any modification or addition to, or subtraction from the terms of the agreement. Unlike the Sixth Circuit, the Court below refused to vacate the arbitrator's decision.

Similarly, in *Local 42, UAW v. TRW, Inc.*, 402 F.2d 727 (6th Cir. 1968), *cert. denied*, 395 U.S. 910 (1969), the Court refused to enforce an arbitrator's award of reinstatement to discharged employees when based upon an application of the doctrine of "fundamental fairness." 402 F.2d at 730. The Court held that the arbitrator exceeded his authority by adding a term to the agreement.

In *Textile Workers Union v. American Thread Co.*, 291 F.2d 894 (4th Cir. 1961), the arbitrator held that a discharge was too severe, despite the company's right to discharge the employee under the terms of the collective bargaining agreement. The Court refused to confirm the arbitrator's decision, holding at 899:

"We are not persuaded that the Supreme Court, in recent cases involving arbitration, and the right to enforcement of arbitration agreements, intended

that the courts should permit an arbitrator to render decisions which do such violence to the clear, plain, exact and unambiguous terms of the submission and the contract of the contending parties."

Additionally, the Second Circuit, in *Torrington Co. v. Metal Products Workers Union Local 1645*, 362 F.2d 677 (2nd Cir. 1966), held that when the arbitrator's authority is questioned, it is subject to judicial review.

"... Therefore, we hold that the question of an arbitrator's authority is subject to judicial review, and that the arbitrator's decision that he has authority should not be accepted where the reviewing court can clearly perceive that he has derived that authority from sources outside the collective bargaining agreement at issue." 362 F.2d at 680.

The Court concluded, at 682, that instead of disrupting the labor process, such review would encourage the use of arbitration by guaranteeing that a decision will be rendered on the basis of the words of the contract and not by a "philosopher king."

This reasoning clearly runs counter to the Ninth Circuit's decision in the presentation. In *Holly, supra*, the Ninth Circuit noted its dispute with the Second Circuit, adding that "there is a significant distinction between the power of the *Torrington* arbitrator and that of the arbitrator in our case." 412 F.2d at 905.

Conclusion.

For all the reasons stated above, petitioner respectfully submits that a Writ of Certiorari should issue to review the decision of the Court below in this case.

Respectfully submitted,

GEORGE A. PAPPY,

Attorney for Petitioner.

APPENDIX A.

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

Chauffeurs, Teamsters & Helpers, Local Union No. 186, *Plaintiff-Appellee*, vs. McNall Building Materials, Inc., *Defendant-Appellant*, No. 75-2340.

[March 11, 1977].

Appeal from the United States District Court for the Central District of California.

Before: KUNZIG, Judge,* WALLACE and Anderson, Circuit Judges.

Appellant, McNall Building Materials, Inc. (Employer) appeals a district court order in favor of appellee, Chauffeurs, Teamsters & Helpers, Local Union No. 186 (Union), vacating a labor arbitration award. The Employer contends that the district court judge improperly vacated the award and urges that we reinstate it. We agree and reinstate the arbitration award.

After the Federal Government instituted wage controls, the Employer and the Union entered into a collective bargaining agreement providing for wage increases. The Agreement was supplemented with a "Memorandum of Agreement,"¹ Paragraph Three of which follows:

In the event any part of such increases is declared by the Pay Board or any other Federal Au-

*Honorable Robert L. Kunzig, Judge, United States Court of Claims, sitting by designation.

¹Hereafter, the agreement and the Memorandum of Agreement will be referred to collectively as "Agreement."

thority or any court to be not allowable, the employers shall thereafter pay the amounts which are determined to be allowable and the remainder of the amount of such negotiated increases shall be deferred and the amount deferred or any part thereof shall go into effect without any retroactivity commencing on the date when wage controls are lifted or modified so as to permit payments to commence.

In 1973 the Cost of Living Council (Pay Board) granted part of the increases agreed to by the parties holding the increases to be fully retroactive to dates specified in the Agreement. The parties disputed the effect of the Pay Board order on retroactivity—the Union calling for full retroactivity, the Employer for none.

The Union demanded arbitration in accordance with the Agreement and eventually filed a district court action to compel it. Arbitration was thereafter ordered by Judge Curtis.² In a memorandum opinion accompanying the order, Judge Curtis stated “the order clearly requires the defendant to pay the salary increases retroactively.” No appeal was taken from this arbitrability ruling. However, the effect of the parties’ Agreement upon the Pay Board order was deemed an issue ripe for arbitration.³

²Honorable Jesse W. Curtis, United States District Judge for the Central District of California.

³*I.e.*, If nothing contrary to the Pay Board order were to be found in the Agreement, presumably the Pay Board order of full retroactivity would stand. A contrary finding in the Agreement could preempt the Pay Board order. The Agreement’s provisions, then, would be “superimposed” on the Pay Board order.

The arbitrator, in a nutshell, agreed with the Employer that Paragraph Three in the Agreement was *not* applicable, since the instant wage increases were allowed, not disallowed. Yet the arbitrator determined that the *intent* of the Agreement as a whole was to provide a general policy of limited retroactivity of all wage increases (allowed and disallowed). Accordingly, the arbitrator produced a compromise decision, allowing half the disputed retroactivity.

The Union, demanding full retroactivity pursuant to the Pay Board’s disposition, filed suit in the district court to vacate the arbitration award. It alleged that the arbitrator exceeded his authority by ruling on the merits of the controversy, after having determined that Paragraph Three was inapplicable. After cross-motions for Judgment on the Pleadings, District Judge Manuel Real⁴ entered an order in favor of the Union vacating the arbitrator’s award without indicating his reasons. The Employer appealed, seeking to reinstate the arbitrator’s decision—thereby limiting to one half, the retroactive wage payments originally allowed by the Pay Board.

The sole issue before us, then, is whether the arbitrator exceeded his authority (and was thus properly overruled by the district court judge). The alleged impropriety occurred when the arbitrator limited the retroactivity of wage increases approved by the Pay Board, after having determined that the collective bargaining agreement did not expressly prescribe the retroactive effect of a Pay Board *allowed* increase. The Union contends that once the Agreement was found

⁴Honorable Manuel L. Real, United States District Judge for the Central District of California.

inapplicable, the district court judge properly vacated the arbitration award as an instance "where an arbitrator does not draw the award from the agreement and exceeds the boundary of the submission to him." *La Mirada Trucking, Inc. v. Teamsters Local Union 166*, 538 F.2d 286, 288 (9th Cir. 1976).

In the case at bar, the arbitrator decided that Paragraph Three did not expressly apply to the retroactive payment of Pay Board approved wage increases, but nonetheless the Agreement as a whole, as well as the intent of the parties, combined to provide a general policy of limited retroactivity. The arbitrator noted that to allow full retroactivity would impose an awesome financial liability upon the Employer, whereas to deny any retroactivity would defeat what he read to be the essence of the Agreement. The arbitrator noted in his award that resolution of the instant dispute involved a balancing of the equities. He determined that the wage increase should be retroactive to a date halfway between the dates contended for by the opposing parties.

Whether the arbitrator exceeded his authority in making the award is governed by the following principles:

"An award is legitimate if it draws its essence from the agreement and only when the arbitrator's words manifest an infidelity to this obligation may the courts refuse enforcement of the award." *Aloha Motors, Inc. and ILWU Local #142*, 530 F.2d 848, 849 (9th Cir. 1976) (quoting *San Francisco Oakland Newspaper Guild v. Tribune Pub. Co.*, 407 F.2d 1327 (9th Cir. 1969) and *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960)). "[I]f, on its face, the

award represents a plausible interpretation of the contract in the context of the parties' conduct, judicial inquiry ceases and the award must be affirmed." *Holly Sugar Corp. v. Distillery, Rectifying, Wine and A.W.I.U.*, 412 F.2d 899, 903 (9th Cir. 1969).

Accord, Campo Machining Co., v. Local Lodge No. 1926 Int'l Ass'n of the Machinists and Aerospace Workers, 536 F.2d 330, 333 (10th Cir. 1976).

This is a close, difficult case and is not one capable of simple resolution. The Union strenuously and persuasively argues that Paragraph Three does not limit the retroactivity of Pay Board approved wage increases. In fact, Paragraph Three states explicitly ". . . the employer shall thereafter pay the amounts which are determined to be allowable."

However, the cited authorities dictate that we view the arbitrator's award in the context of the parties' intent as a whole, and not merely by analyzing the words used in part of the Agreement.

The arbitrator carefully considered the parties' motivation for including Paragraph Three before ruling that the parties intended to limit the retroactivity of approved increases. He concluded that the drafters of the Agreement never anticipated a situation arising, such as here, wherein the Pay Board would allow a pay raise and rule it retroactive. The clause in question was designed to effectuate the wage controls of the Federal Government. (The parties intended that if the wage controls were removed, wage increases could not be put into effect retroactively as if no wage controls had ever existed.) Although we can see the viewpoint of the Union that the words alone of Para-

graph Three tend to point to a contrary result, the arbitrator concluded that the *essence* of the Agreement was "to give some protection against retroactivity." At the very least, we cannot say his interpretation is not "plausible." *Holly Sugar Corp. v. Distillery, Rectifying, Wine and A.W.I.U.*, *supra* at 903; *Accord, Aloha Motors, Inc. and ILWU Local #142, supra*, at 849. The arbitrator therefore did not exceed his authority.

At its foundation, our decision rests on the notion that the maintenance of the arbitration system is dependent upon judicial restraint in its review. Unless the arbitrator's determination is "implausible," or rises to the level of being "a capricious, unreasonable interpretation," a court should stay its hand. *Holly Sugar Corp. v. Distillery, Rectifying, Wine and A.W.I.U.*, *supra* at 904. We believe that, under normal circumstances, parties to arbitration should expect the result of arbitration to be final. In accord with the traditional deference due the arbitration process, we think the district court should have stayed its hand in this case. The arbitrator's decision is well within the standards for review set by the courts.

In light of the foregoing, we hold the district court judge to have improperly vacated the arbitration award. We reverse the district court and reinstate the arbitration award.

REVERSED.

APPENDIX B.

Section 10 of Title 9 of the United States Code, titled "Arbitration," as amended, 61 Stat. 672, is as follows:

Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.